

**PREVENTIVE LAW**

**SERIES**

**Legal Assistance Program**

***TOPIC:***

***WILLS AND ESTATE PLANNING***

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## YOUR LAST WILL & TESTAMENT

*The material in this handout represents general legal principles. The law is continually changing; although the information in the handout was current as of the date it was drafted, some provisions in this pamphlet may have changed. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.*

Many military members and spouses use a **Last Will & Testament** to distribute their property, also known as their “estate;” name an *executor* (one who administers the estate); and name a *guardian* of their children (one with whom a minor lives) and a guardian of the estate for the children (one who manages the minor’s property). The will is often the main part of the estate plan, but it must be coordinated with other estate planning tools such as trusts, life insurance, or beneficiary designations.

### **What happens if I do not make a will?**

Some people believe they do not need a will because they do not own very much. If you die without a will (“intestate”) state law determines who receives your property, and who will care for your minor children. If you are married, most states provide for distribution of a portion of your property to your surviving spouse. If you have children, most states provide for some of your property to go to your children. This can cause difficulty in some situations.

**EXAMPLE:** James dies with no will. His wife, Jill, and two minor children survive him. Jill will get the house and all the money in the bank accounts if she and James owned that property as joint tenants with right of survivorship. However, the stock James owned in his own name will be divided between Jill and the children. Jill may have to get a probate court’s permission to use the children’s share of the property for their benefit. This takes time and money.

### **Who can make a will?**

Any person 18 years old or older and of sound mind can make a will. These two basic requirements must be met but there are other factors that are important as well. The person should be free of coercion, that is they are making the will because they want to do it, not because someone else wants them to, and have an awareness of his or her assets and possessions and family members (regardless of whether the family members are included in the will or not).

### **Can assets be given to whomever I name?**

This is generally true, with two notable exceptions. In most States, the surviving spouse can choose to receive a fixed share of the estate regardless of what the will states. This may not apply if a spouse receives property by means other than the will, such as life insurance proceeds. Also in some States, a child born after the will is signed takes a share of the estate as if no will existed, unless it’s made clear that the testator intended to exclude the child.

### **Does a will cover everything I own?**

Not always. Some property passes to your beneficiaries apart from your will.

- (1) Life insurance: Money from a life insurance policy goes to the person named as a beneficiary on the policy.
- (2) Retirement plans: Money from a retirement plan is paid to the beneficiary you named in the plan. This includes a 401(k) account, thrift savings plan, or an individual retirement arrangement (IRA).
- (3) Property owned as a joint tenant with right of survivorship: If you own real estate, cars, bank accounts, or other property with someone else as a joint tenant with right of survivorship, the co-owner inherits your share when you die.
- (4) Living trust: Any property that you place in a living trust during your lifetime passes according to the trust. Often it goes to your beneficiaries when the trust ends.

(5) A spouse's half of community property: In a community property state (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin) real estate and possessions acquired during marriage are owned equally by each spouse. Your will distributes only your half of the community property. It may dispose of all of your separate property, that is, possessions and property you brought into the marriage along with gifts and inheritances you received.

(6) "Transfer on death" or "Pay on death" accounts: Some bank accounts and security accounts may be held with a beneficiary designation such as "transfer on death" ("TOD"). Other assets, such as U.S. savings bonds, may be held in a form directing those assets to be "paid on death" ("POD") to a named beneficiary.

### **Are any special people named in a will?**

Yes, your will should name:

(1) *Your beneficiaries*: Family members, friends, organizations, or others who will inherit your assets.

(2) *Guardian*: The person who will take care of your children if you die before your children become adults. The guardian will raise the children and make decisions about their day-to-day activities (for example, school). In many cases the guardian also manages any property a minor child inherits until the child reaches legal age under state law. In some cases, a trustee will manage the property. Consider these factors in selecting a guardian for your minor children:

(a) Is the person you want to serve old enough?

(b) Is the person physically able to handle the job?

(c) Does your choice have the time to raise your children?

(d) Can you provide enough money to raise the children? If not, can your choice afford to raise the children?

(e) Does your choice care for your children's welfare?

You should discuss the possibility of serving as a guardian with your potential choice to determine if that person is willing and able to do so. Remember, just because you name someone in your will as a guardian does not mean that person has to be the guardian.

(3) *Executor*: The person or institution that collects your property, pays the debts and any taxes that are due, and ensures the remaining property is distributed to the beneficiaries.

### **Can I leave property to minor children in my will?**

Yes, minor children (children under 18 years of age) can inherit property. However, depending on the type of personal property, an adult must manage it until the child becomes an adult. Your will can name someone to manage the property for the minor, thus avoiding the need for a court-appointed guardianship. Some examples of property management arrangements are:

(1) Name a custodian under the Uniform Transfers to Minors Act. Under most state laws, you can choose someone, called a ***custodian***, to manage property you are leaving to a child. If you die when the child is under the age set by the law of your state of legal residence, the custodian will manage the property until the child reaches the age specified by your state's law—usually either 18 or 21 years of age.

(2) Set up a trust for each child (testamentary trust). You can use your will to name someone (called a ***trustee***) who will handle the property the child inherits until the child reaches the age you specify. When the child reaches that age, the trustee ends the trust and gives whatever is left in the trust to the trust beneficiaries.

(3) Set up a "pot trust" for your children. If you have more than one child, you may want to set up one trust for all of them. This arrangement is usually called a pot trust. In your will, you establish the trust and appoint a trustee. The trustee decides what each child needs and spends money accordingly from the trust assets.

(4) Name a property guardian. You can use your will to name a property guardian for your child. Then, if at your death your child is still a minor and needs a guardian, the court will appoint the person you named. The property guardian will manage whatever property the child inherits until the child is no longer a minor.

**When should I use a testamentary trust?**

A testamentary trust is created in your will. It becomes effective when you die. It is funded with the assets as directed by your will. A testamentary trust is frequently used as a contingent trust for minor children in case there is no surviving parent while the children are under eighteen (majority). This trust allows you to name a trustee to manage the property for minor children. Parents who think eighteen is too young to inherit property can select an older age, such as twenty-one or twenty-five. The trustee would continue to manage the property for the child until the child reached the age set in the trust.

Your trustee can be another person or institution if you prefer someone other than your children's guardian. A testamentary trust also can be used where one parent does not want the other parent to control or have access to the property going to the children such as divorced or separated parents.

If you use a testamentary trust for minor children, you have to decide how and when to distribute the property. One method is to give each child a separate share of the property in a separate trust for each. This may end up with higher costs overall for jointly owned property as each trust operates independently of the others. Also, some of the children may end up with their shares being used faster than the other children depending on health, education, and other support payments.

**What happens to my will if I get divorced? If I get married?**

Under some State laws, if you get divorced after you've written a will the spouse named in the will is automatically eliminated as a beneficiary under the will when the divorce is final. Your ex-spouse may still inherit other assets by operation of law or statute. If you marry after you've written a will your spouse receives the same share he or she would have received without a will unless the will makes clear that the omission was intentional or if the spouse was provided for outside the will. An intentional omission doesn't change the rights of the spouse to take a fixed share unless such rights have been relinquished in a marital agreement. You should discuss a change in your marital situation with a legal assistance attorney to evaluate whether you need to change or prepare a will.

**How long is a will valid?**

Until you revoke it by destroying it, or prepare and execute a new one.